Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Fibertech Networks, LLC.	)	RM-11303
	)	
Petition for Rulemaking	)	
	)	

REPLY COMMENTS OF AT&T INC.[1]

Pursuant to Section 1.405 of the Commission's Rules (47 C.F.R. §1.405) and the Commission's January 10, 2006 *Order* modifying the pleading cycle in this proceeding,[2] AT&T Inc. ("AT&T") respectfully submits this reply to the comments of other parties on the above-captioned petition by Fibertech Networks, LLC ("Fibertech") requesting the Commission to initiate a rulemaking to adopt a set of "best practices" governing access by competitors to poles and conduits of incumbent local exchange carriers ("ILECs") and other utility owners of such facilities.[3]

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[1] On November 18, 2005, SBC Communications Inc. closed on its merger with AT&T Corp. The resulting company is now known as AT&T Inc. In these comments, "AT&T" refers to the merged company and its wholly-owned subsidiaries, including its ILEC operating subsidiaries, unless otherwise noted.

[2] *See Fibertech Networks, LLC (Petition for Rulemaking)*, RM-11303, Order (Competitive Pricing Division, rel. January 10, 2006) (revising pleading cycle in *Public Notice* (DA-05-3182) rel. Dec. 14, 2005).

[3] Petition for Rulemaking of Fibertech Networks, LLC, RM-11303, filed December 7, 2005 ("Pet."). Appendix A lists the parties in addition to AT&T that filed initial comments in this proceeding.

The other commenters on Fibertech's petition essentially fall into two distinct and diametrically opposed camps.[4] One set of those parties – in particular, members of electric industry and its trade associations -- adamantly oppose *any* examination by the Commission of the issues that Fibertech has raised, and contend that further federal regulation of pole attachment and conduit use by competitors is not only unnecessary but would be affirmatively disruptive to, and even unsafe for, owners of those facilities and their personnel.[5] On the other side, competitors of utilities uncritically endorse Fibertech's rulemaking petition, without remedying any of the evidentiary and other shortcomings of that request for relief that AT&T pointed out in its Comments (at pp. 3-5).[6] In several cases those competitors even seek to have the Commission further broaden Fibertech's requested rulemaking to address other concerns and to adopt yet additional regulation of facility owners.[7]

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[4] A notable exception, in addition to AT&T, is the RAA, a coalition composed of members of the real estate industry that does not oppose Fibertech's petition to have the Commission address these issues, so long as the Commission takes into account the rights of property owners to control access to their own premises. RAA, pp. 2-4.

[5] *See* Electric Companies, pp. 4-18; Utilities, pp. 13-24; Qwest, pp. 3-12; UTC/EEI, pp. 3-18; USTA, pp. 1-6; Verizon, pp. 2-13; WMECO, pp. 2-6.

[6] *See* Comptel, pp. 2-5, IFW, pp. 2-6; McLeod, pp. 2-8; NextG, pp. 5-14; segTel, pp. 2-15; Sigecom; pp. 3-8; Sunesys, pp. 5-13; Tropos, pp. 2-4; Virtual Hipster, pp. 5-13.

[7] *See. e.g., NextG*, pp. 1-2 (requesting that the Commission impose presumptions that pole top attachments of wireless devices is permitted, and that equipment boxes be permitted in "unusable" space); segTel, p. 12 (arguing that the Commission should permit utilities to reserve spare conduit "only as absolutely necessary").

In particular, Comptel (pp. 5-11) urges the Commission not only to adopt all of Fibertech's proposed "best practices," but also to adopt a laundry list of "presumptions" concerning both liability and the appropriate means of "remediation" for noncompliance with those proposed regulations. These include a presumptive finding that such noncompliance also violates Section 251(b)(4) of the Communications Act (47 U.S.C. § 251(b)(4)); a presumption that ILECs should be required to provide access to dark or lit fiber transport as a remedy for noncompliance; a *res ipsa loquitur* liability standard where an ILEC fails to provide timely access to conduit in its own building; and presumptive award of consequential damages, "using a 'disgorgement' theory," for noncompliance with such rules.

(footnote continued on following page)

Neither of these facile positions provides an adequate basis for the Commission to address Fibertech's rulemaking petition, or to discharge its statutory obligation to further the public interest in a vibrantly competitive telecommunications marketplace. As AT&T showed in its Comments (p. 3), the underlying premise of Fibertech's petition -- namely, that nondiscriminatory access to poles and conduit is necessary for preservation of a competitive marketplace – is beyond any serious dispute. It thus would not be responsible discharge of the Commission's regulatory oversight function or sound public policy for the Commission simply to assume, absent further inquiry, that these important underpinnings for market competition require no additional reinforcement.

However, the anecdotal evidence of alleged utility wrongdoing that Fibertech and some other commenters have provided simply does not document widespread misconduct on the part of pole and/or conduit owners.[8] Indeed, AT&T notes that several commenters that support the Fibertech petition *do not cite even a single specific instance* of an incumbent facility owner's

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Even if there were as yet an adequate record for rules adopting any of Fibertech's "best practices" -- and AT&T's Comments showed that any such finding is unwarranted based on the existing record before this Commission – the "remedies" Comptel proposes are clearly unwarranted. For example, as Comptel itself recognizes (pp. 7-8), the Commission's *Triennial Review Order* categorically rejected granting competitors access to dark fiber as a UNE, and greatly limited access to lit fiber for UNEs. No party here has made any showing that would support the Commission's revisiting those conclusions, and Comptel's filing is nothing more than a grossly untimely request for reconsideration. Comptel's suggestions for "presumptive" damages remedies are, if possible, even more irresponsible. *See e.g.*, Comptel p. 10 (asserting that this requested relief is "authorized under Section 206 *(??check*)" [*sic*] (emphasis supplied)).

[8] *See* AT&T Comments, p. 4 n. 5 (citing numerous allegations of misconduct in Fibertech's petition that relate to the activities of a single telecommunications carrier). *See also* segTEL, *passim* (describing problems assertedly encountered with access to utility-owned facilities by commenter that operates only in three New England states).

alleged failure to provide nondiscriminatory access to poles or conduit.[9] Those that do so limit their comments to describing such actions either by an unidentified utility or by a small number of such entities.[10] Such generalities paint with far too broad a brush. For example, AT&T showed in its Comments (at 6) that its ILEC affiliates' Interconnection Agreements ("ICAs") negotiated with competitors already address a number of the concerns Fibertech raises, such as allowing CLEC personnel to conduct record searches with appropriate safeguards for proprietary data and permitting competitors to use AT&T-approved contractors, subject to periodic on-site review by AT&T personnel.

The "evidence" marshaled to this point by those that support additional regulation for competitive access to utility owners' pole and conduit facilities thus falls well short of the Commission's statutory obligations for adopting rules under both the Administrative Procedure Act ("APA") and settled law.[11] For this reason, AT&T renews the request in its opening Comments (pp. 3, 8) that if the Commission elects to initiate a rulemaking, such a proceeding should be utilized to compile a record for decision, rather than tentatively proposing any specific, highly prescriptive regulations such as Fibertech and other commenters suggest.

Even with a more adequate factual record, moreover, the Commission should not resort to imposing additional detailed market rules on utility owners of poles and conduit without first

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[9] *See* comments of Comptel; IFW; McLeod; Sigecom; Tropos.

[10] *See, e.g.,* NextG, p. 5 (stating that "in one case" it paid an unnamed utility for make-ready work that was not timely performed); Sunesys, pp. 5-10 (citing alleged discriminatory conduct by three named electric utilities).

[11] *See* APA, 5 U.S.C. § 553(c) (in rulemaking agency must provide statement of "the basis and purpose" of regulations adopted in the proceeding); *see also, e.g., U.S. Telecom Ass'n v. FCC,* 290 F.3d 415, 422 (D. C. Cir. 2002), *cert. denied sub nom. WorldCom, Inc. v. U. S. Telecom Ass'n,* 123 Sup. Ct. 1571 (2003).

carefully evaluating the necessity for such detailed regulation. Negotiation between utilities and competitors seeking access to those facilities are preferable in the first instance to regulatory fiat, because such bipartite agreements generally produce more economically-efficient outcomes that adequately balance the time intervals needed to provide service to competitors' end users with issues of worker safety and network integrity. The Commission's first priority should be to assure that the incentives for parties to reach such arrangements are maintained and further strengthened if the record discloses the need for such action. Regulatorily-imposed solutions should be adopted only in the case of demonstrable market failures, and then only to the minimum extent necessary to achieve the pro-competitive objectives of the Telecommunications Act of 1996 and established Commission policy.

In this regard, AT&T has already shown in its Comments (pp. 4 n.6 and 5) that the need for further Commission intervention in the current process is greatly attenuated by the fact that arbitration of disputes between telecommunications carriers and their competitors regarding access to poles and conduit before state regulatory commissions is already available and that even apart from that mechanism, at least 19 states have asserted their regulatory authority over pole attachments and related facilities. Especially in light of this regulatory landscape, the Commission should entertain further intervention in negotiated arrangements only to the extent that such dispute resolution procedures are otherwise unavailable to resolve any issues that are not successfully resolved through discussions between the parties.[12]

[12] In this regard, AT&T noted in its Comments (p. 5 n. 8) that electric utilities are not subject to the arbitration provisions of the Telecommunications Act of 1996. This marked disparity in regulatory authority over these entities seriously detracts from the bargaining power of the electric utilities' competitors to successfully engage in negotiated resolutions of disputes with those utilities concerning access to their poles and conduits. AT&T's own experience, both in its roles as an ILEC and CLEC, has been that electric utilities are often difficult to deal with to obtain access to pole and/or conduit space,

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CONCLUSION

For the reasons stated above and in AT&T's Comments, the public interest will not be disserved by the Commission's initiating a rulemaking to compile evidence regarding the extent and marketplace impact of the conduct Fibertech describes in its petition. However, if the Commission elects to initiate a rulemaking, it should refrain from including in such a rulemaking any tentative conclusions regarding specific proposed regulations such as those Fibertech suggests.

Respectfully submitted,

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because there is limited recourse against those utilities in the absence of an effective remedy such as arbitration under Section 252. The contention of the electric utility commenters that Fibertech's grievance is strictly with ILEC pole and conduit owners is simply disingenuous. Thus, if the Commission elects to initiate a rulemaking in response to Fibertech's petition, it should ensure that the proceeding compiles a record regarding the extent and marketplace impact of the conduct of *all* utilities that are subject to Section 224, including electric utilities.

APPENDIX

List of Commenters – RM-11303

Ameren Corp., Florida Power & Light Company, PacifiCorp, Public Service Electric and Gas Company, Southern California Edison Company, Tampa Electric Company and Virginia Electric and Power Company (collectively, the "Electric Companies")

American Electric Power Service Corporation, Duke Energy Corporation, Wisconsin Electric company, WPS Resources Corporation and Xcel Energy Inc. (collectively, the "Utilities")

Comptel

Indiana Fiber Works, LLC ("IFW")

McLeodUSA Telecommunications Services, Inc. ("McLeod")

NextG Networks, Inc. ("NextG")

Qwest Communications ("Qwest")

Real Access Alliance ("RAA")

segTEL, Inc. ("segTEL")

Sigecom, LLC ("Sigecom")

Sunesys, Inc. ("Sunesys")

Tropos Networks ("Tropos")

United Telecom Council and the Edison electric Institute ("UTC/EEI")

United States Telecom Association ("USTA")

Verizon Telephone Companies ("Verizon")

Virtual Hipster Corporation ("Virtual Hipster")

Western Massachusetts Electric Company ("WMECO")

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March 2006, copies of the foregoing "Reply Comments of AT&T Inc." were served electronically and U.S. first class mail on the parties listed below:

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